COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 080626-00 033403-03 056095-00**
William Pilon, Jr.	Employee
R.S. Guerette Corp.	Employer
Mass. Insurers Insolvency Fund[1]	Insurer
Specialty Contracting Services, Inc.	Employer
Workers' Compensation Trust Fund	Insurer
Specialty Contracting Services, Inc.	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Carroll and Costigan)

APPEARANCES
Michael D. Tracey, Esq., for the employee
William H. Murphy, Esq., for the Mass. Insurers Insolvency Fund at hearing
Paul M. Moretti, Esq., for the Mass. Insurers Insolvency Fund on appeal
Pedro Benitez-Perales, Esq., for the Workers' Compensation Trust Fund
Michael K. Landman, Esq., for AIM Mutual Insurance Co.

McCARTHY, J. The Massachusetts Insurers Insolvency Fund ("the Fund") appeals from a decision in which an administrative judge ordered it to pay the employee's claim for workers' compensation benefits stemming from a June 3, 1998 carpal tunnel injury to his right arm. The Fund stood in the shoes of the insolvent Credit General Insurance Company. See G. L. c. 175D, § 1, *et seq.* Following a § 10A conference, the judge ordered AIM to pay two closed periods of weekly benefits based on a 2000 date of injury. Cross appeals brought the case to a § 11 hearing. The hearing decision then fixed liability for those payments onto the Fund. The Fund argues that the judge erred by ordering it to reimburse a successive insurer, AIM Mutual Insurance Company ("AIM"). We conclude that the present case stands outside of the general rule that G. L. c. 175D

[1] For Credit General Insurance Company.

does not authorize the Fund to make payments to an insurance company. Therefore, we affirm the decision.[2]

The employee experienced pain and numbness in his right arm, wrist and hand while working with a jackhammer in 1997. He also developed similar symptoms in his left arm. By June 3, 1998, the symptoms had increased to the point that the employee reported an injury and filled out an incident report. He continued to experience worsening of his pain until he stopped working for that employer, R. S. Guerette, in October 1998. Credit General Insurance Company insured R. S. Guerette during the relevant time period. Credit General later became insolvent. (Dec. 3, 7.)

The employee went to work for Specialty Contracting Services, Inc., in November 1998. The employee continued to experience bilateral symptoms in his arms, wrists and hands throughout his employment there, until he stopped working on December 28, 2000. AIM Mutual Insurance Co. was the insurer for Specialty at all relevant times. Specialty was uninsured for workers' compensation from November 1, 1998 to November 30, 2000 when AIM came on the risk, hence, the Workers' Compensation Trust Fund's involvement. (Dec. 3, 7.)

The employee claimed benefits against AIM, the insurer for his second employer, Specialty. AIM was ordered at conference to pay the employee closed periods of §§ 34 and 35 benefits. Both the employee and AIM appealed that order to an evidentiary hearing. In the interim, the employee filed a motion to join a claim against the Fund, as guarantor of the insolvent Credit General, insurer for R. S. Guerette. (Dec. 3.) The judge allowed the joinder, and ultimately concluded that the Fund was liable for payment of benefits for the employee's carpal tunnel condition. (Dec. 3-4, 13.) The judge ordered that the Fund pay the employee a closed period of § 34 and ongoing § 35 benefits, which award covered the periods of benefits already paid by AIM under the § 10A conference order. The judge denied and dismissed the employee's claim against AIM, and ordered

[2] We summarily affirm the decision with respect to the Insolvency Fund's argument that AIM, the successive insurer, was liable for the payment of benefits to the employee. We therefore exclude the extensive medical component of the decision on appeal from our discussion.

that the Fund take credit for, and reimburse AIM for, those benefits it had already paid to the employee. (Dec. 14.)

The question on appeal regards the scope of the statutory term, "covered claim," in G. L. c. 175D. The Massachusetts Insurers Insolvency Fund "is obligated only on 'covered claim[s],' defined as 'unpaid claim[s] . . . which arise[] out of and [are] within the coverage of an insurance policy . . . issued by an insurer, if such insurer becomes an insolvent insurer and . . . the claimant or insured is a resident of the commonwealth.'" Clark Equipment Co. v. Massachusetts Insurers Insolvency Fund, 423 Mass. 166, 167 (1996), quoting G. L. c. 175D, § 1(2)(a). The Fund does not dispute that the amounts due the employee that were not included in the conference order of payment against AIM are a "covered claim." The Fund argues only that the benefits AIM paid pursuant to the conference order are not within the scope of that "covered claim" because that term excludes any "amount due any reinsurer, insurer, insurance pool, or underwriting association." G. L. c. 175D, § 1(2). The Fund contends that the employee's claim against Credit General was not "unpaid" (and therefore not "covered") insofar as AIM paid benefits to the employee under the conference order.

The Fund confuses the employee's claim against AIM for his claim against Credit General. The Fund is liable to pay the hearing decision award because Credit General is insolvent and thus the claim against it is "unpaid." See Ulwick v. Mass. Insurers Insolvency Fund, 418 Mass. 486, 488 (1994)(claim against American Mutual was "covered claim," as "it [was] unpaid because American Mutual is insolvent"). AIM paid on the employee's *separate* claim against it for a work injury alleged to have occurred on an entirely separate date of injury, December 28, 2000, as opposed to Credit General's injury date of June 3, 1998. "[AIM's] payments of the statutory claims against it therefore did not constitute payment of [the employee's] claim against [Credit General] arising out of an insurance policy." Id. "[I]t is the claim, not the injured person, which must be 'unpaid' in order that the claim be considered a 'covered claim.'" Id.

The Appeals Court relied on Ulwick, supra, in Massachusetts Insurers Insolvency Fund v. Ladd, 39 Mass. App. Ct. 553 (1995). The Ladd court stated, with regard to Ladd's claim against the insolvent insurer:

> American Mutual did not pay Ladd under its policy because American Mutual is insolvent. The payments that Ladd received from [her health care insurer] . . . did not result from the insurance coverage that Ladd had with American Mutual, and would not have offset or reduced American Mutual's liability under the policy. Ladd's claim against American Mutual therefore remained an "unpaid claim." [Citation to Ulwick, supra.] Accordingly, we reject the Fund's argument that, in the circumstances shown here, the Fund was entitled to offset its obligation to Ladd by the amounts she received from [the health care insurer] . . . .

Ladd, supra at 556. We think that the same reasoning applies in the present case.

To the extent that the Insolvency Fund relies on Ferrari v. Toto, 9 Mass. App. Ct. 483 (1980), *aff'd* 383 Mass. 36 (1981), there is an important difference in the nature of the litigation that we consider pertinent. That case involved a *single* workers' compensation claim, and a third party action for the same motor vehicle accident pursuant to G. L. c. 152, § 15. That statute mandates that any sum recovered against a third party is "for the benefit of the insurer." It was one claim that was being paid, and the only question was, from which source? The court reasoned, "[I]t does not seem to us that a claim, to the extent it has already been compensated from some other source, is an unpaid claim." Id. at 486.

Here, AIM's payments under the conference order were not for the claim against Credit General for the June 3, 1998 injury which the Fund was obligated to pay. There was no other insurer which had any liability for that date of injury; it was entirely an "unpaid claim" constituting a "covered claim" under c. 175D. That AIM is an ultimate beneficiary of the Fund's payment ordered pursuant to the hearing decision does not change the independent nature of the two claims filed by the employee here. Thus, the court's broad language in Ferrari, supra, is inapposite: "We are of the opinion that the Fund is excused from paying claims if the ultimate beneficiary is an insurance company." Id. Ferrari involved *one* motor vehicle accident, in which "an alternative source of compensation from an insurance carrier [was] available[.]" Id. at 487. Ferrari, the

employee, had no stake whatsoever in the proceeds of the third party action against the insolvent insurer. Given the amounts that the compensation insurer had paid in his compensation claim and the limits of liability coverage in the third party action, all of the recovery was to go toward reimbursement of the compensation insurer, pursuant to § 15. Ferrari v. Toto, 383 Mass. 36, 38-39 (1981). Had there been no third party recovery in Ferrari (as is usually the case), the compensation insurer simply would have been liable to pay all benefits under c. 152. Nothing of the sort is at play in the present case. The judge concluded that Credit General was the liable insurer as of the earlier date of injury that it covered; the employee's claim against it was "unpaid" and therefore "covered" under c. 175D due to its insolvency. Ladd, supra.

Moreover, we think that the nature of proceedings at the department is also relevant to the analysis. The § 10A conference order of payment against AIM was *interlocutory.* "The Supreme Judicial Court has held that a § [10A] conference order is interlocutory and not appealable [to the judiciary] on the merits." Matthews's Case, 27 Mass. App. Ct. 12, 13 (1989), citing Assuncao's Case, 372 Mass. 6, 9-11 (1977). "If the insurer has timely sought redetermination [of the conference order] by [the administrative judge] under the formal hearing procedure (G. L. c. 152, § [11]), proceedings before the [department] remain interlocutory." Cabral's Case, 18 Mass. App. Ct. 141, 143 (1984). When the judge filed his decision on the hearing de novo, the conference order against AIM was rendered void and unenforceable. See Assuncao, supra at 10 n.2. Again, the present successive insurer case is not governed by the principles announced in Ferrari, supra. At no point here were two insurers – one solvent and one insolvent – chargeable to pay the same claim on behalf of the employee. Cf. Ulwick, supra (Wilkins, J., dissenting)(Insolvency Fund not intended to cover entities who normally would be entitled to subrogation against a wrongdoer's insurer).

Accordingly, we affirm the decision. Unless the parties agree on a more direct and expeditious method, upon receipt of payment from the Fund of § 34 weekly benefits for the period January 29, 2002 to April 30, 2002 and § 35 benefits covering the period

May 1, 2002 to July 31, 2002, the employee shall immediately reimburse AIM for all sums paid by it to him for these same weekly periods.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***April 20, 2006***

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge